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SITRAC CORPORATION SDN BHD & ANOR v. DATO' SYED HAMZAH SYED ABU BAKAR (DECEASED; REPRESENTATIVE APPOINTED) & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[CIVIL SUIT NO: WA-22NCC-623-11-2019]
14 AUGUST 2022

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Abstract – *There is no exact science in the assessment of general damages. The expenditure on legal bills in instructing solicitors and engaging counsel are actual damages and comes under the umbrella of general damages.*

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DAMAGES: *Assessment – Legal bills – Claimants' legal bills in appointing solicitors and/or counsel – Whether legal fees incurred actual damages that were reasonably foreseeable – Reasonable sum for distress, inconvenience and hardship suffered by claimants*

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Owing to the non-compliance of a discovery order, an unless order in terms was made against the first defendant's representative. The disobedience order of the unless order resulted in judgment being entered against the first defendant in terms as per the following: (i) that the High Court order was declared to have been obtained by fraud and/or dishonesty by the first defendant; (ii) that the High Court order obtained by the first defendant was impeached and set aside in totality and the originating summons ('OS') was struck off and/or set aside in totality; (iii) the first defendant's action of filing the OS amounted to an abuse of process and be struck off and/or set aside; (iv) general damages to be assessed against the first defendant; and (v) costs and interest. Hence, the present application by the plaintiffs for assessment of damages. In support of the application, the plaintiff submitted that (i) in relation to having to file the present suit, the plaintiffs incurred legal bills fully-settled by the plaintiffs in appointing solicitors and/or counsel, totalling up to RM300,477.73; (ii) following the conduct of the first defendant, legal action would have to be taken by the plaintiffs against the first defendant; therefore, legal fees incurred by the plaintiffs were actual damages that were reasonably foreseeable; and (iii) damages of RM50,000 was a reasonable sum for distress, inconvenience and hardship suffered by the plaintiffs in defending and/or protecting the shares of the second plaintiff in the first plaintiff, which shares the first defendant sought to unilaterally transfer by practising deception on the court and the second defendant through deliberate and conscious concealment of evidence relevant and material in regard to the OS without the knowledge of the plaintiffs.

Held (assessing total damages for legal bills and for hardship and inconvenience at RM225,477.73 with costs of assessment fixed at RM5,000):

(1) The plaintiffs' legal fees, amounting to RM300,477.73, was the actual damages suffered. The plaintiff had to incur the fees to protect their interests in the shares. The expenditure on legal bills by the plaintiffs, in instructing solicitors and engaging counsel to defend and/or protect the second plaintiff's shares in the first plaintiff were clearly actual damages caused directly by the first defendant's wrongs and came under the umbrella of general damages. In any case, these legal costs could not have been pleaded as special damages as the present proceedings were on-going. Causation was established; but for the first defendant's fraud and/or dishonesty in obtaining the High Court order, these present proceedings would not have been rendered necessary and legal bills would not have to be incurred. (paras 28-30)

(2) Legal bills totalling RM300,477.73 was not unreasonable at all. The court, in the exercise of discretion, (i) allowed the sum of RM220,477.73; and (ii) awarded only nominal damages of RM5,000 for hardship and inconvenience. (paras 32 & 38)

Case(s) referred to:

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Bonham-Carter v. Hyde Park Hotel Limited [1948] 64 TLR 177 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Cheong Fatt Tze Mansion Sdn Bhd v. Hotel Continental Sdn Bhd; Hong Hing Thai Enterprise Sdn Bhd (Third Party) [2010] 1 LNS 980 HC ***(refd)***

Doyle v. Olby (Ironmongers) Ltd [1969] 2 All ER 119 ***(refd)***

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***

Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi [2021] 2 CLJ 485 CA ***(refd)***

Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***

Lau Yang Kim v. Rescom Australia Sdn Bhd & Anor [2020] 4 CLJ 130 HC ***(refd)***

Ling Peek Hoe & Anor v. Ding Siew Ching & Ors And Another Case [2022] 7 CLJ 412 HC ***(refd)***

Livingstone v. Rawyards Coal Company (1880) 5 App Cas 25 ***(refd)***

MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai [2021] 6 CLJ 30 CA ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA ***(refd)***

Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Professor Emeritus Dr Azman Awang & Anor v. FSBM CTech Sdn Bhd & Anor [2021] 1 LNS 1737 ***(dist)***

Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2021] 1 LNS 2233 HC ***(refd)***

Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd and Another [2008] SGCA 8 ***(refd)***
Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors [2021] 1 LNS 1740 HC ***(refd)***
Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors [2022] 2 CLJ 641 HC ***(refd)***
Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769 ***(refd)***
Sonic Finance Inc & Anor v. Halim Mohammad & Ors [2019] 1 LNS 651 HC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2007] 5 CLJ 489 CA ***(refd)***
Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd [2007] 6 CLJ 228 CA ***(refd)***
Yap Boon Hwa v. Kee Wah Soong [2019] 1 LNS 1157 CA ***(refd)***

For the plaintiff - Lim Kian Leong & Jessica Chong; M/s Lim Kian Leong & Co
For the 1st defendant - Simrenjeet Singh & Ng Tat Sun; M/s Simrenjeet, Tay & Co
For the 2nd defendant - Zuriatul Mida & Nor Syairah; Companies Commission of Malaysia
For the 3rd defendant - Nik Asilah; M/s Zahir Jeya & Zainal

Reported by Najib Tamby

JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] Pursuant to the plaintiffs' application in enclosure ("encl.") 203, I had assessed damages at sum of RM225,477.73. These are the reasons for my decision.

Background

[2] Owing to the non-compliance of the discovery order made on 25 August 2021, an "unless order' in the terms as contained in encl. 176 was made on 21 September 2021 against the first defendant's representative to be complied with by 30 September 2021. The disobedience of the "unless order "resulted in judgment being entered on 18 October 2021 against the first defendant on terms as follows:

(i) that the order obtained on 21 May 2019 by the first defendant in Kuala Lumpur High Court Originating Summons No. WA-24NCC-134-03-2019 is declared to have been obtained by fraud and/or dishonesty by the first defendant;

(ii) that the order obtained on 21 May 2019 by the first defendant in Kuala Lumpur High Court Originating Summons No. WA-24NCC-131-03-2019 is impeached and set aside in totality and High Court Originating Summons No. WA-24NCC131-03-2019 is struck off and/or set aside in totality;

(iii) the first defendant's action of filing the High Court Originating Summons No. WA24NCC-131-03-2019 amounts to an abuse of process and struck off and/or set aside;

(iv) general damages to be assessed against the first defendant;

(v) interest to accrue at the rate of 5% per annum on such damages as may be assessed and awarded by this Honourable Court from the date of judgment till the date of full and final settlement of the same;

(vi) first defendant to pay costs of RM75,000 to the plaintiffs subject to allocator;

(vii) first defendant to pay costs of RM30,000 to D2 subject to allocator; and

(viii) first defendant to pay costs of RM40,000 to D3 subject to allocator.

[3] The reasons for allowing the discovery application, the background leading to the filing of this suit, the nature of the plaintiffs' suit have been set out in my first grounds of judgment – see *Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors* [2021] 1 LNS 1740; [2022] 8 MLJ 43. The reasons for making the 'unless order', its non-adherence leading to judgment being entered against the first defendant were set out in *Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors* [2022] 2 CLJ 641; [2022] 10 MLJ 900.

[4] The first defendant has since appealed against the decision of this court in making the order for discovery, the 'unless order' and judgment entered on 18 October 2021. These three appeals were pending hearing before the Court of Appeal when the plaintiffs filed encl. 203 on 11 November 2021 for assessment of damages pursuant to the judgment dated 18 October 2021.

[5] The parties agreed that assessment would proceed by way of affidavits.

[6] As the first defendant's solicitors have discharged themselves pending hearing of encl. 203, the first defendant was granted an extension of time during case management on 12 January 2022 to file his affidavit in reply to the assessment of damages by end February 2022 but did not do so. Instead on 29 March 2022, the first defendant filed two applications respectively for extension of time to file an affidavit in reply and to stay the assessment of damages pending hearing of the above appeals. The assessment of damages was derailed pending the hearing of these two applications. Both applications

were subsequently dismissed as this court found there were no material before the court that constituted cogent reasons warranting the exercise of discretion by the court in the first defendant's favour, whether for extension of time or for a stay of the assessment of damages.

The Parties' Arguments

[7] It was submitted by the plaintiffs that upon discovery of the first defendant's actions and attempts to unilaterally transfer the shares of the second plaintiff in the first plaintiff by way of rectification of the first plaintiff's register through the court and the second defendant, the plaintiffs had hastily sought the service of solicitors and submitted an objection to the second defendant and filed the present suit against the first defendant to impugn the court order dated 21 May 2019 ("the impugned court order") obtained by the first defendant in Originating Summons No. WA-24NCC-131-03-2019 ("OS 131") and to strike out and/or set aside OS 131 in its entirety on the ground that the first defendant has practised deception on the court through deliberate and conscious concealment of evidence relevant and material in OS 131 in obtaining the impugned court order. The first defendant had filed two appeals against the 'unless order' and judgment respectively both dated 18 October 2021.

[8] It was averred in the plaintiffs' affidavit affirmed on 11 January 2022 that in relation to having to file the present suit, the plaintiffs incurred legal bills fully settled by the plaintiffs in appointing solicitors and/or counsel, totalling up to RM300,477.73 (RM318,701.52 – RM18,223.79 (the legal bill on a separate file but related to this suit)) which was paid for by the plaintiffs. It was further averred that the cost of RM300,477.73, incurred on the legal bills should less out the cost of RM5,000 awarded in the order dated 26 June 2019, and the cost of RM75,000 awarded in the judgment dated 18 October 2021 giving a sum of RM220,477.73. It was submitted that following the conduct of the first defendant, legal action would have to be taken by the plaintiffs against the first defendant, thus legal fees incurred by the plaintiffs are actual damages that are reasonably foreseeable citing in support:

(i) *MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai* [2021] 6 CLJ 30; [2021] 5 MLJ 408 where the Court of Appeal stated:

> The court agreed with the principles laid down in *Lo Foi v. Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310 and found that the appellant's sole claim for 'total legal fees and disbursements of RM70,000' came within the meaning of 'the tortious damage' and the 'foreseeability test' and that the claim for the legal fees was not too remote ...
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> The learned justices were of the view that the appellant's payment of legal fees amounting to RM70,000 was 'actual damage' suffered.

(ii) *Yap Boon Hwa v. Kee Wah Soong* [2019] 1 LNS 1157; [2020] 1 MLJ 37:

> The defendant is the shareholder of 99,999 shares in Premier Property Sdn Bhd whilst his wife owns one share. The learned High Court Judge was of the view that the defendant owns and is the directing mind and will of Premier Property Sdn Bhd. The learned High Court Judge rejected the argument by the second plaintiff that, as the legal fees was paid by Premier Property Sdn Bhd, the defendant did not suffer loss. The legal fees paid by Premier Property Sdn Bhd to the defendant's solicitors must have been paid at the behest and directive of the defendant. Having to defend the suit, to pursue the counterclaim, to prove the fraudulent misrepresentation of the second plaintiff and in bringing witnesses for the trial had resulted in the defendant having to incur legal expenses and fees. Hence such expenses are reasonable and recoverable.

(iii) *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2021] 1 LNS 2233; [2021] MLJU 2648 where legal fees and costs over and above the party-to-party costs were allowed as damages.

[9] Apart from legal costs, it was averred that, damages of RM50,000 is a reasonable sum for distress, inconvenience and hardship suffered by the plaintiffs in defending and/or protecting the shares of the second plaintiff in the first plaintiff, which shares the first defendant sought to unilaterally transfer by practising deception on the court and second defendant through deliberate and conscious concealment of evidence relevant and material in regard to OS 131 without the knowledge of the plaintiffs. The plaintiffs only came to know of the first defendant's actions after the impugned court order was served on them. The issues raised by the first defendant in OS 131 surrounding the second plaintiff's shares in the first plaintiff have been raised several other times before in different situations:

(i) the first time in 1992 in the High Court Suit No. D2-22-1507-1992. The case was dismissed after a full trial, decision of the High Court was affirmed by the Court of Appeal and up to the leave to appeal stage in the Federal Court;

(ii) the first defendant had also made police reports against Syed Mustaffa bin Syed Abdullah Shahabuddin in relation to the same shares;

(iii) a similar complaint, as in the rectification, was made to the second defendant on 17 August 2006 which was investigated by the second defendant and subsequently dismissed due to insufficient evidence on the part of the first defendant.

[10] In contesting the claim under the two heads of damages, the first defendant on the other hand contended that:

A (i) the legal bills are special damages which must be strictly pleaded and established by the claimant – *Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors* [2015] 8 CLJ 125; [2016] 7 MLJ 183; *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324 FC. Specifically, in *Lau Yang Kim v. Rescom Australia*
B *Sdn Bhd & Anor* [2020] 4 CLJ 130; [2020] MLJU 105, Amarjeet Singh JC held:

> [26] In my view, legal fees fall within the meaning of special damages. I reach this conclusion after applying the test stated in *Ong Ah Long* (*supra*). I find that legal fees are ascertained expenses
C and therefore particularity is necessary to warn the defendant of what is being claimed or the claims that he will be confronted with at the trial.
>
> [27] However in the present case the legal fees could not be pleaded and proved at the trial because the legal fees have yet to crystallise. To be entitled to an award of special damages the items
D constituting special damages must have been expended before the trial begins. In the present case the dates of the twelve invoices that make up the legal fees range from 15 June 2015 until 13 August 2018 and the payment in respect of the twelfth invoice was only made on 15 October 2018 after the trial of this action was
E concluded. Therefore, the legal fees of a concluded action cannot be claimed in the same action as special damages.

(ii) legal fees cannot qualify as damages; instead, they are costs incurred by the plaintiffs in defending themselves in the proceedings. Even if the plaintiffs tried to argue that the fees are special damages, the fees have
F not been pleaded by the plaintiffs, and the judgment dated 18 October 2021 did not provide for costs on an indemnity basis. To allow the claim for legal fees would mean allowing a claim for costs on an indemnity – *Professor Emeritus Dr Azman Awang & Anor v. FSBM CTech Sdn Bhd & Anor* [2021] 1 LNS 1731; [2021] MLJU 2227;

G (iii) the plaintiffs have not discharged their burden of proof as merely invoices of Messrs Lim Kian Leong & Co were produced;

(iv) in the event of finding of liability to make payment towards the legal bills, this court ought to make deductions in respect of the legal costs previously awarded so that there is no double recovery – *Ling Peek Hoe*
H *& Anor v. Ding Siew Ching & Ors And Another Case* [2022] 7 CLJ 412; [2022] MLJU 157; *Sonic Finance Inc & Anor v. Halim Mohammad & Ors* [2019] 1 LNS 651; [2019] MLJU 1887.

[11] As for the claim for distress, inconvenience and hardship caused by
I the first defendant, there was no evidence to support this claim – *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784.

Legal Principles On Assessment Of Damages

[12] The High Court in *Cheong Fatt Tze Mansion Sdn Bhd v. Hotel Continental Sdn Bhd; Hong Hing Thai Enterprise Sdn Bhd (Third Party)* [2010] 1 LNS 980; [2011] 4 MLJ 354 at p. 378, explained the law on the difference between general damages:

> In *Halsbury's Laws of England* 4th Edn Reissue para 812, the distinction between 'general' and 'special' damages is well illustrated as follows:
>
> > A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss; here, general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered.

[13] In short general damages:

(i) arise naturally and in the normal course of events;

(ii) are not capable of precise quantification in monetary terms; and

(iii) are presumed to be the natural or probable consequence of the wrong complained of.

[14] The purpose of awarding damages is to give the claimant compensation for the damage, loss or injury that he has suffered. At least three Court of Appeal cases in *Uda Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2007] 5 CLJ 489; [2007] 6 MLJ 530, *Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi* [2021] 2 CLJ 485; [2021] 2 MLJ 738 and *Wembley Gypsum Products Sdn Bhd v. MST Industrial Systems Sdn Bhd* [2007] 6 CLJ 228; [2007] 7 MLJ 193 cited the oft-quoted words of Lord Blackburn in *Livingstone v. Rawyards Coal Company* (1880) 5 App Cas 25 (HL) at p. 39:

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> ... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[15] The burden of proof is on the party seeking damages to prove the fact
B of damage and the amount of damages (*Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89; [1999] 1 MLJ 65 (CA); *Bonham-Carter v. Hyde Park Hotel Limited* [1948] 64 TLR 177; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v. Direct*
C *Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229 (CA). If the claimant fails to satisfy the court on the fact of damage and quantum, then his claim for damages must fail or he would be awarded nominal damages where his right has been infringed.

[16] Where precise evidence is obtainable, the court naturally expects to
D have it, where it is not, the court must do the best it can – *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 352.

[17] There must be a causal connection between the wrong and the loss. Causation was stressed in *Popular Industries Ltd* (*supra*):

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> A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable.

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Damages – Proving It

[18] The process of proving damage is intensely factual and the plaintiff could not simply make a claim for damages without placing before the court sufficient evidence of the loss it had suffered even if it was otherwise entitled in principle to recover damages – *Robertson Quay Investment Pte Ltd v. Steen*
G *Consultants Pte Ltd and Another* [2008] SGCA 8

[19] The principles that emerge from the Court of Appeal's decision in *Sony*'s case on proving loss or damages are instructive:

(i) the plaintiff must produce all necessary supporting documents. In *Sony*'s case the plaintiff failed to produce the documents to support the audited
H statements of account. This proved to be fatal;

(ii) the plaintiff must lead evidence on the computation or breakdown of the loss. The plaintiff failed to do so in *Sony*;

(iii) the causal connection must also be shown. In *Sony*'s case, the plaintiff
I failed to prove the contents of the reduction in the volume of services and how this related to the alleged breach of the agreement;

(iv) a summary of particulars or sheet of calculations or summary of accounts do not prove the contents. They are nothing more than conclusions. They must be proven by calling the maker to explain the facts and basis of calculation. In addition, the books to support the calculation must be in evidence.

[20] *Sony* was cited in another Court of Appeal decision. In *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1, the Court of Appeal dismissed the appellant's appeal for, amongst others, these reasons:

(i) failure to provide precise evidence on damages;

(ii) failure to lead evidence of actual loss;

(iii) no substantiation of figures;

(iv) "plucking figures out of the air";

(v) self-serving statements by the appellant's own officers without calling independent witnesses;

(vi) claims for losses not suffered by the appellant for charged lands. The charged lands did not belong to the appellant. It belonged to PW2 but the appellant was claiming damages for the sale of the charged land;

(vii) appellant's failure to mitigate its loss.

[21] Some passages from the judgment merits production:

> [189] The person who is claiming damages must prove his case. Thus, the claimant in order to justify an award of substantial damages he must satisfy the court as to the fact of damage and as to its quantum (*Senate Electrical Wholesalers Ltd v. Alcatel Submarine Networks Ltd (Formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Law Reports 423 (CA)). *If the claimant fails to satisfy the court on the fact of damage and quantum, then his action must fail or at the very least he would be awarded nominal damages where his right has been infringed*.
>
> [190] Put in another way, the claimant must show *actual loss* and evidence must be led in that direction. It is submitted that the appellant has failed to prove damages with precise evidence (*Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229, (CA); and *Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan* [2003] 4 CLJ 785; [2004] 1 MLJ 411, (CA)) and that the appellant has also failed to lead evidence to show actual loss.
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> (emphasis added)

Decision

[22] I deal first with the claim for legal bills.

[23] Besides bearing the above principles in mind, it must not be forgotten that the order obtained on 21 May 2019 by the first defendant in Kuala Lumpur High Court Originating Summons No. WA-24NCC-134-03-2019 was declared to have been obtained by fraud and/or dishonesty by the first defendant.

[24] Lord Denning MR in the English Court of Appeal case of *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 119 said:

> *In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it*. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. *In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say*:
>
> > I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also, he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. *He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received*. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.
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> (emphasis added)

[25] The law stated in *Doyle v. Olby* was approved by the House of Lords in *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 where Lord Browne-Wilkinson held that:

> ... the primary rule was that a victim of fraud was entitled to compensation for all the actual loss, including consequential loss, directly flowing from the transaction induced by the deceit of the wrongdoer and damages is not limited to those that are reasonably foreseeable.
>
> ... The assessment of damages would therefore include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit or fraud.

[26] Examples of Malaysian cases that followed the *dictum* in *Doyle v. Olby* are *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227; [2003] 3 MLJ 460 (CA), *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174, *Yap Boon Hwa v. Kee Wah Soong* [2019] 1 LNS 1157; [2020] 1 MLJ 37. In the latter, the Court of Appeal said:

> [63] In a claim for damages, we are guided by *Doyle v. Olby* where the court had stated that '... He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received ...

[27] The Court of Appeal allowed legal fees in *Yap Boon Hwa v. Kee Wah Soong* (*supra*) at [77] and [79].

[28] In this case, the plaintiffs' legal fees amounting to RM300,477.73 is the actual damages they suffered. The plaintiff had to incur the fees to protect their interests in the shares.

[29] Quite apart from *Yap Boon Hwa v. Kee Wah Soong*, I find there is merit in the plaintiff's submission that another two cases of the Court of Appeal namely *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188; [2015] 1 MLJ 490 and *MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai* made clear that legal bills are claimable as damages. I am in accord with the Court of Appeal's view, for in the present case, the expenditure on legal bills by the plaintiffs in instructing solicitors and engaging counsel to defend and/or protect the second plaintiff's shares in the first plaintiff are clearly actual damages caused directly by the first defendant's wrongs and comes under the umbrella of general damages. In any case, these legal costs could not have been pleaded as special damages as these present proceedings were ongoing. *Professor Emeritus Dr Azman Awang*'s case is distinguishable on the basis that Her Ladyship Adlin Abdul Majid JC was not called upon to consider legal costs in an ongoing action such as the present which could not have been pleaded; the legal costs in that case were incurred for the past action and could have been pleaded.

[30] I find causation was established – but for the first defendant's fraud and/or dishonesty in obtaining the impugned court order in OS 131, these present proceedings would not have been rendered necessary, and legal bills would not have to be incurred.

[31] Commendation, however, must be given to learned counsel for the plaintiffs, the late Mr Lim Kian Leong who in his usual frank and candid self- had from the outset of his submissions stated that the costs previously ordered (even though not paid) should be deducted from the legal bills. This as explained in *Sonic Finance Inc* (*supra*) at [34] is to avoid 'double recovery' in respect of the costs (by way of the previous orders granting costs and through this assessment).

[32] What was left for consideration was the quantum of the legal bills. Given the late Mr Lim Kian Leong's seniority and well recognised legal abilities, I do not find the legal bills totalling RM300,477.73 as being

unreasonable at all. I will, in the exercise of discretion, allow the sum of RM220,477.73 (*ie*, RM300,477.73 less (i) RM5,000 awarded in the order dated 26 June 2019, and (ii) the cost of RM75,000 awarded in the judgment dated 18 October 2021) following *Sonic Finance Inc*.

[33] As for the first defendant's contention that receipts were not produced, I find there is a positive averment in para. 8 of the affidavit affirmed on 11 January 2022 by Mr Ngan Chin Woo that these bills have been paid. In fact, the whole affidavit stood unrebutted. In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281, it was held that: 'In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted'.

[34] Bearing in mind the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Limited* (1948) 64 TLR 177, this was not the case here where the plaintiffs simply wrote down the particulars of their damages and threw them to the court and demanded for it.

[35] As for the amount of RM50,000 sought for distress, inconvenience and hardship caused by the first defendant to the plaintiffs, I have kept in mind:

(i) that the law recognises corporate entities too can sue and recover for inconvenience, embarrassment and damage to reputation; and

(ii) that there is no exact science in the assessment of general damages.

[36] *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784 for some unknown reason was submitted by the first defendant.

[37] In *Professor Emeritus Dr Azman Awang*'s case, Her Ladyship Adlin Abdul Majid JC awarded RM200,000 in general damages for the hardship caused to the plaintiff in that case. However, here, there is inadequate substantiation of the sum sought. Thus, I exercise my discretion to award only nominal damages of RM5,000 for hardship and inconvenience which sum I think, is fair for the trouble the plaintiffs have been put through. I have considered that the matter which has its genesis in 1992, spanned almost 30 years, and the plaintiff's representative, who has personal knowledge of the matter, is 84 years old. He had to testify at trial in open court at the height of the Covid-19 pandemic, and he is also the deponent of the plaintiffs' affidavits.

[38] Total damages for legal bills, and for hardship and inconvenience as such is assessed at RM225,477.73 with costs of assessment fixed at RM5,000 subject to allocator.